IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 2 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? :

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KADARBAPU HARUN

Versus

STATE OF GUJARAT

Appearance:

MR MAHENDRA K PATEL, for the Appellant

MR S.P.DAVE, A.P.P. for Respondent No.1

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 15/03/2001

ORAL JUDGEMENT

The original accused of Special (NDPS) Case No.14 of 1996 by preferring this appeal under Section 374 of the Criminal Procedure Code, 1973 (for short 'Cr.P.C.')

challenged the legality and validity of judgement, Exh. 25 dated 13, October, 1997 rendered by the Additional Sessions Judge, Jamnagar (who will be referred to as the learned Judge of the trial Court) in aforesaid Special (NDPS) Case No.14 of 1996.

2. The facts leading to this present appeal in a nutshell are as follows :

On or about 15th May, 1996 at about 17:30 hrs. accused was found with possession of 'Ganja' weighing about 140 gms. at the place behind Manoj Guest House, in village Okha in Jamnagar District without pass or permit. By following due procedure prescribed under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'Act'), P.S.I. Shri H.G. Parmar seized that article of 'Ganja' under a panchnama in presence of two panch witnesses. Thereafter, a complaint was lodged against the accused in Okha Police Station on 15th May, 1996 and that case was investigated by the police and ultimately a charg-sheet was filed in the Court of the learned Judicial Magistrate, First Class, Dwarka. The learned J.M.F.C. passed an order under Section 209 of Cr.P.C. and committed the case to the Court of the Sessions, Jamnagar.

3. Thereafter, the learned Judge of the trial Court framed charge, Exh. 3 on 28th July, 1997 against the accused to which he pleaded not guilty and claimed to be tried. Thereafter, prosecution examined six witnesses and also produced certain documents in support of the case of the prosecution. Thereafter, after appreciation of the evidence and after hearing the arguments of the learned advocates for both the parties, the learned Judge of the trial Court came to a conclusion that the case

against accused who came to be charged for committing an offence punishable under Section 20(b)(i) of the Act, is proved, and therefore, by rendering his judgement, Exh.25 on 13th October, 1997 convicted the accused and sentenced him for the said offence to undergo rigorous imprisonment for five years and to pay a fine of Rs.50,000/-, and in default of fine, to undergo further simple imprisonment for six months. As against this judgment of conviction and sentence, the original accused has preferred this present appeal.

4. When this appeal was taken up for final hearing, Mr.M.K.Patel, learned advocate for the appellant, who has

been appointed as amicus curie for the appellant-accused has submitted that his arguments are limited and restricted only for the point of quantum of sentence and he is not arguing any factual aspects of the case. He has further submitted that the case based on facts is not challenged but the only sentence is challenged. Hence appellant has dropped his arguments on the point of 'conviction'.

5. Mr.M.K.Patel has argued that the accused has undergone sentence of more than three years and five months after conviction. Accused had remained in jail for about four months before the trial. He has further argued that looking to quantity of 'Ganja' and age of the accused the sentence inflicted by the learned Judge of the trial Court is harsh and exorbitant and some leniency be shown to the appellant on the point of quantum of sentence. He has cited two authorities : (i) Deep Chand Vs. State of Rajasthan, reported in 1996 Criminal Law Journal 54, (Rajasthan High Court). Mr.M.K. Patel has argued that in this cited case contraband article 'Ganja' was weighing about 2 Kg. 500 gms. The learned Judge of the trial Court in that cited case had sentenced the accused to undergo rigorous imprisonment for five years and to pay a fine of Rs.50,000/-. The Rajasthan High Court, after considering the facts and circumstances of that case found that sentence inflicted by the learned trial Court was not just and proper. The Rajasthan High Court reduced the substantive sentence from five years to one year and an amount of fine was also reduced to Rs.50,000/to Rs.1,000/-. In that case the petitioner was about 50 years old. (ii) Raja Ram Vs.State of Rajasthan, reported in 1996(1) Crimes 360 (Rajasthan High Court). Mr.M.K.Patel has further argued that in this cited case accused was found with possession of 'Ganja' weighing about 210 gms. The learned Judge of the trial Court in that case had inflicted a sentence of five years and a fine of Rs.50,000/-. The Rajasthan High Court after considering the facts and circumstances of that case, reduced the sentence from five years to the period already undergone and fine was also reduced from Rs.50,000/- to Rs.1,000/-.

6. By citing aforesaid two authorities Mr.Patel has argued that in the present case quantity of 'Ganja' was 140 gms. When accused was arrested, he was 40 years old. He has further argued that looking to the record and proceedings of the case, the accused had remained in judicial custody before trial for the period of 15th May, 1996 to 10th September, 1996. He has further submitted that after conviction he was not released on bail. At

present the accused is in jail since 13th October, 1997 and therefore, practically the accused has undergone substantive part of the sentence of jail, and therefore, some leniency be shown to the appellant, looking to the facts and circumstances of the case.

7. As against the submissions made by Mr.Patel, Mr.S.P.Dave, learned A.P.P. for the respondent State has submitted that order to inflict a sentence is a discretionary order. The learned Judge of the trial Court has considered the subject with regard to infliction of sentence in para 3 of the operative portion of the judgement and thereafter he has inflicted the sentence as aforesaid. Mr.S.P.Dave, learned A.P.P. has further argued that from the case papers, it appears that article of 'Ganja' was not kept by the appellant for his own use, and therefore, sentence is just and adequate and it should not be reduced. Lastly, he argued that appeal be dismissed.

8. Here, in this case, quantity of 'Ganja' was only 140 gms. Age of the accused was about 40 years as on date of commission of offence. He has practically undergone sentence of three years and nine months. Before infliction of sentence, accused was heard on the point of sentence and he had submitted before the learned Judge of the trial Court that quantity is small one and it was kept for his own use. He had further submitted

before the Judge of the trial Court that he is having a family with children, he is a responsible person in his family and there is no other bread-winner in his family, and therefore, minimum sentence be inflicted.

9. After hearing the learned advocates for both the parties, the learned Judge of the trial Court has observed in his order that sentence of five years and fine of Rs.50,000/- is mandatory and he is not in a position to inflict lesser sentence. It is prescribed in Section 20(b)(i) of the Act that, if accused is found guilty, the Court may inflict sentence which may extend to five years and impose fine which may extend to Rs.50,000/-. It is crystal clear that there is no provision with regard to sentence being mandatory for five years and fine of Rs.50,000/-. It is true that to inflict sentence is discretionary order. However, looking to the facts and circumstances of the case and age of the accused and looking to the legal position which is referred to, in aforesaid two authorities this Court is of the view that the sentence is harsh and exorbitant and it requires some modification.

10. This Court is of the view that if accused is sentenced to undergo the sentence already undergone and pay a fine of Rs.5,000/-, it will meet the ends of justice, and therefore, order with regard to sentence only deserves to be modified.

11. In view of what is stated hereinbefore, this appeal is partly allowed. The appellant-accused is ordered to undergo sentence for the period already undergone by him and to pay of fine of Rs.5,000/- (Rs. Five thousand) and in default of payment of fine, to undergo further rigorous imprisonment for two months. With these modifications this appeal is partly allowed.

(H.H. Mehta, J)

'Bhavesh'